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**HPAO REVIEW OF
CA/TH CONTRACT AWARD
NO: C14C4**

September 1995

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Findings and Recommendations

- The MHD contract award process which deemed seven of eight contractors ineligible on a technicality was erroneous and could easily have been avoided.
- MHD's decision to require prequalification in the category of utilities was not sufficiently publicized and created a trap for the unwary.
- MHD's provision of bid documents to contractors who were not prequalified violated the provisions of the prequalification statute.
- MHD has since acknowledged its mistake and has proposed actions to remedy any problems with new classifications of work.
- Questions remain about MHD's statutory interpretation that could allow them to review prequalification only at the bid opening. The Bureau believes this practice policy exceeds the scope of MHD's statutory authority.
- MHD must continue to take steps to insure that all contractors receive all necessary information to make responsible bids and insure the integrity of the contract award process.
- The Bureau noted significant disparities between the bids received and the office estimates. The Bureau recommends a separate evaluation of project estimation techniques be conducted to examine the issue of large deviations between office estimates and actual bids.

Introduction

The House Post Audit and Oversight Bureau (the "Bureau"), at the request of the Speaker of the House of Representatives, conducted an investigation of the Massachusetts Highway Department's ("MHD") actions relating to the bidding process and contract award for contract number: C14C4, a utilities relocation contract which is part of the Central Artery/Third Harbor Tunnel Project ("CA/THT"). This contract award was for utilities relocation including large sanitary sewer and storm drainage lines, low and high pressure

water lines, sewer, gas, electric and telecommunication lines and MBTA power lines from East India Row to State Street in Boston.

The Bureau examined the process by which MHD awarded the contract which ultimately led to litigation between MHD and seven (7) out of eight (8) of the contractors who submitted bids on the contract. Each of the contractors in the suit had bid proposals rejected by MHD for failure to prequalify in a previously unused work category called "utilities". As part of the review, the Committee subpoenaed the files on MHD's prequalification process, interviewed representatives of the affected contractors and examined court briefs and other legal documents.

Background

The Committee and the Bureau have been examining a number of issues relating to the CA/THT project. The CA/THT project includes the depression of a significant portion of the existing I93 through the city of Boston as well as the construction of the Third Harbor Tunnel. The project requires significant underground construction and necessarily involves the relocation of a substantial number of utility lines and conduits in the affected areas under the existing artery.

The Statutory Scheme and MHD Regulations

The relevant statute at issue in this contract award is the prequalification statute, M.G.L. c.29, §8B.¹ That statute mandates that the Commissioner of MHD require that any person proposing to bid on construction or reconstruction of roadways submit a statement of qualification to perform the work. The statute provides that the statement of qualification be in such form and require such information as the Commissioner may require. It states in pertinent part:

"...any person proposing to bid on any work ...to be awarded by the department of highways...submit a statement under the penalties of perjury setting forth his qualifications to perform such work. Such statement shall be in such detail and form and shall be submitted at such times as such commissioner may prescribe under rules promulgated by said department subject to the requirements of chapter thirty A."

The statute also directs the Commissioner to deny a request for official bid documents from any contractor that does not file a prequalification statement or where, in the judgment of the Commissioner, the contractor is not qualified:

"The Commissioner shall refuse to furnish such prospective bidder with bid proposals for such work and shall reject any bid by such prospective bidder for such work." (emphasis added)

Pursuant to the statutory authority provided in Chapter 29§ 8B, MHD regulation provides further that:

"Any contractor proposing to bid on work under the direction of the Department, aggregating

¹This section was substantially rewritten by Chapter 345 of the Acts of 1993.

\$50,000 or more, must furnish for approval by the Prequalification Committee a statement on forms provided by the Department, setting forth its Aggregate Bonding Capacity, financial resources, adequacy of plant and equipment, organization, experience and any other pertinent facts as required..." (720 CMR § 5:02(1))

On May 19, 1994 MHD held a public hearing on MHD's revised regulations for Prequalification of Contractors 720 CMR 5:00. The regulations were initially promulgated as emergency regulations, but were later proposed and promulgated as regulations pursuant to the Administrative Procedure Act. These regulations had been promulgated in response to the statutory revisions enacted in 1993. While the regulations clearly identify several distinct categories of work, they do not refer to utilities as a separate class.

In the course of reviewing the court documents filed in the litigation, the Bureau noted an affidavit filed by an MHD contract employee. The affidavit stated in pertinent part:

"To the best of my knowledge the category of utility work has existed for many years."

This affidavit filed in the Civil Action 95-3151 is curious. The Bureau found that while the category of "utilities" was technically created in 1983, it was never used for any contracts by MHD or its predecessor the Department of Public Works ("DPW") prior to this contract.

Other than this affidavit, the Bureau found no evidence that indicated that the classification of utilities was ever used or disseminated to the public prior to the contract in question.

The Bureau also noted that section 5:02(7) of the revised regulations in the section "Class of Work" desired, states:

"Each contractor shall indicate, in the place provided in the application for prequalification the particular class or classes of work upon which it desires to bid; but such indication shall not be binding upon the Prequalification Committee in classifying a contractor. (emphasis added)

This section would appear to give MHD the flexibility necessary to prequalify qualified contractors and arguably could have been utilized to avoid the dispute here. Further, in section 5:03(4), requests for additional classes may be considered at any time. Such additional request "unless otherwise approved by the Prequalification Committee must be submitted fourteen (14) calendar days prior to the bid opening." Thus, although the statute and MHD regulations clearly allow for the creation of separate classes of work such as "utilities", no specific regulatory provision mentioned the class "utilities" at the time of this award process.

Facts

After reviewing all of the appropriate statutory and regulatory pronouncements governing MHD's obligations in the area of the prequalification, the Bureau then examined the specific facts relative to this contract award.

The MHD publicly advertised the contract (C14C4 Utilities Relocation East India row to State Street) in February of 1995. On February 23, 1995, MHD issued a "Notice to Contractors" which outlined the scope of work called for by the contract. Both the advertisement used by MHD for the award of this contract and the "Notice to Contractors" clearly identified the term "utilities" and stated that the contractors who sought to bid on the

work must be prequalified in the classification of "utilities". (See copy of Notice to Contractors attached as Appendix #1) Substantial utilities relocation work had already been performed on the CA/THT project, yet no requirement that a prospective bidder be prequalified in utilities was ever imposed.

In the course of the award process, twelve (12) contractors filled out forms requesting official bid documents. A review of the "Request for Proposal Forms and Plans & Specifications" received by MHD revealed that each of the bidders requested "official" bid documents and represented themselves as being prequalified for the category of work required. MHD was clearly on notice that seven (7) of the eight (8) contractors who actually submitted bids for the contract believed that they were prequalified in the appropriate category (utilities), yet MHD did nothing to alert those contractors that they were not.

The only contractor that apparently recognized MHD's change in requirements for prequalification in the utilities category was Modern Continental Construction Co. (Modern). On March 27, 1995, Modern's request for prequalification in the category of utilities was approved by MHD. None of the other bidders requested prequalification in utilities at any time prior to the opening of the bids. Gioioso and Sons had made a request to be qualified in the category of "underground utilities", however MHD had denied their request to be qualified in "underground utilities" as that class did not exist.

On May 23, 1995, bids from contractors were publicly opened. Bid results in order of ascending amounts were:

McCourt Construction Co.	\$12,473,975.50
M. DeMatteo Construction Co.	\$12,863,387.00
Jay Cashman Inc.	\$12,979,615.00
J.F. White Contracting Co.	\$13,410,771.00
Modern Continental Construction Co.	\$13,724,122.40
Felix Equities, Inc.	\$14,562,413.00
R. Zoppo Corporation	\$14,696,097.00
P. Gioioso & Sons, Inc.	\$17,428,564.00
MHD Engineers Estimate	\$17,600,000.00

Upon bid opening, MHD determined that of the eight bids received, only Modern's bid was valid because none of the other bidders had been prequalified in "utilities". MHD took the position that only Modern's bid was eligible for consideration under prescribed statutory and regulatory requirements. MHD deemed Modern to be the lowest responsible and eligible bidder and awarded the contract to Modern despite receiving four bids that were below Modern's.

The problem with this contract award resulted in part from the fact that in April of 1994, MHD modified its prequalification regulations (720 CMR s.5 et seq). Through revisions of its regulations, MHD sought to review the qualification of bidders upon opening of bids only, rather than at the time the bid proposal was issued and again at the bid opening. (See attached letter to the House Post Audit and Oversight Committee Chairman Nagle from MHD's Chief Counsel as Appendix #2).

According to MHD, the change in the regulations would require a review of prequalification status of a contractor only once. The Bureau is concerned however that this interpretation is not consistent with the statute. The existing language of M.G.L. c. 29, § 8B clearly states, "If in the judgement of the Commissioner the prospective bidder is not

qualified, the Commissioner shall [emphasis added] refuse to furnish such prospective bidder with bid proposals for such work." It is the Bureau's view that the current interpretation of MHD renders the above-quoted statutory language meaningless. It is this change of interpretation that contributed to the problems in this contract award process.

The Bureau notes that what MHD did in this case, namely qualifying contractors after bids were received, had been identified by the Ward Commission as an area of potentially significant abuse.

"The practice of evaluating a contractor only after he has been identified as the low bidder increases the likelihood that rejection of the bidder will be challenged and result in litigation, with substantial damages possible if the challenge is successful. The practice also increases the opportunity for fraudulent collusion between awarding authorities and contractors, who are particularly vulnerable to extortion once they have been identified as low bidders. The rejection of a contractor after bidding is concluded can lead to substantial delay in the award of a general contract and in the start of construction if the awarding authority's action is challenged. These potential delays make awarding authorities particularly reluctant to obstruct the process at that point."

The above issue notwithstanding, the specific item which generated the litigation at issue involved the sudden decision by MHD to require prequalification in the "utilities" category. Even though utility work had been done previously on the CA/THT - no requirement for prequalification in that category had ever been used. The contractors who bid

on this particular contract simply assumed they were prequalified in the classification of utilities because they had been provided with bid documents by MHD.

However, as previously stated, only one of the contractors, Modern actually received prequalification for the classification of utilities.² Another contractor, Gioioso applied for prequalification under the category of "underground utilities", but was denied because MHD ruled that there was no category entitled "underground utilities", but only utilities.³ (The Bureau notes that the provisions of 5:02 (7) could have rectified this problem as it relates to Gioioso.)

After MHD rejected all of the proposals except for that of Modern, the furor over the new procedures and change in the rules erupted. The unsuccessful bidders filed suit. MHD, apparently recognizing the tenuous nature of its legal position, worked to expedite the hearing of the case. After a one day trial, the Superior Court issued an expedited decision.

The Superior Court decision rejected MHD's rationale for disqualifying all of the other bidders but Modern. The court, relying on equitable principles, noted that all of the contractors were qualified and had, in fact, relied on MHD's actions to their detriment. The decision soundly chastised MHD for a poor process. The decision stated in part:

"After considering all of the evidence, this court concludes that to permit the award of this contract to Modern under the procedures utilized by MHD would elevate form over substance. Moreover, for this court to adhere rigidly to a classification never heretofore utilized by MHD to reach the undesirable result of having a public bidding process which rejects four substantially lower bids by qualified, financially responsible and experienced highway and utility construction

²Modern Continental was approved for utilities classification on March 27, 1995.

³Gioioso applied in March of 1995 for prequalification as to underground utilities.

contractors to award the contract to a fifth higher, and much more expensive bidder, would be against the public interest, and in violation of the public policy considerations which underlie the public bidding statutes of the Commonwealth.

Accordingly, this court issues a permanent injunction restraining and enjoining MHD from awarding the contract to Modern, and it orders the defendant MHD to award the contract to McCourt unless, within three days from the date of this opinion, MHD can demonstrate to this court that McCourt is not the lowest, responsible bidder fully qualified by its prior experience to perform the work."⁴

The court's decision to award the contract to the lowest bidder has not been appealed.

According to the unsuccessful contractors, they assumed that prequalification had been achieved because they had received officially numbered bid proposals and plans for the work. MHD policy and practice was understood to be that only prequalified firms would receive such materials. In fact, M.G.L. Ch 29 s. 8B expressly directs MHD not to give out official bid documents to contractors who are not qualified.

'MHD was in violation of this statute when it furnished the litigating bidders with official bid documents.'⁵

Clearly, the intent and purpose of the prequalification statute was to protect the Commonwealth from unqualified contractors. Notwithstanding the fact that all of the contractors who bid on this contract were in fact qualified to perform the work, MHD's

⁴Superior Court decision, page 3.

⁵Superior Court decision, page 7.

adherence to the new "utilities" classification created a trap for those who thought that their receipt of bid materials indicated that they had actually been qualified.

In March of 1995, MHD was put on notice that there was a lack of understanding about the requirements for the new classification. One of the contractors contacted indicated that "everyone was asleep about this new classification." When MHD received questions about the prequalification category of utilities, or when Gioioso applied for prequalification for "underground utility", MHD had plenty of time to notify all concerned that only contractors with prequalification status in "utilities" would be allowed to bid.

The arbitrary nature of this action did not escape the scrutiny of the Superior Court judge. The decision stated in part:

'There was no evidence that Gioioso or any other plaintiffs were notified that they had failed to qualify because of this technicality.'⁶

Perhaps most telling about this process was MHD's admission at trial that its procedures would have permitted all of the plaintiffs to have faxed their prequalification statements on any Monday morning prior to the opening of bids on May 25, 1995.

It is not entirely clear as to why MHD suddenly chose this specific point in time to require prequalification in the utilities category even after changes in the law and regulations. Clearly, utilities relocation work on the project had already been performed successfully without using this category. A review of the records indicated no mention of a past problem with utilities relocation work. According to MHD legal personnel, the decision to require utilities prequalification was made by the construction section. However, documents subpoenaed by the Committee indicated that the decision to invoke the utilities category was

⁶Superior Court decision, page 5.

made by MHD's Prequalification Committee. A draft memorandum dated June 20, 1995 said: "[t]he Prequalification Committee determined that it was appropriate to require contractor prequalification in the utilities category."

Since the court decision, MHD has publicly acknowledged its mistake and has proposed immediate corrective actions. In a letter to the Committee, MHD acknowledged that it will take the following actions:

1. For those contracts where official proposals have been issued to contractors not prequalified to perform work in a particular category, MHD has issued a formal notice, by certified mail, to each such contractor rescinding its issuance of the official proposal, and notifying the contractor that it must become prequalified in order to receive a new official proposal. The notice also indicates that the Department's Prequalification Committee will expedite review of any application for category expansion to accommodate each contractor's opportunity to bid.
2. The Prequalification and Contract Office will hereafter certify a contractor's prequalification status before an official proposal is issued to any contractor. The Prequalification Committee is also prepared to expedite review of any application for category expansion to accommodate the contractor's opportunity to bid.
3. The Department has undertaken a complete review of the categories it maintains, including the definitions for each. Realistic and legitimate categories will be retained, new categories will be created where appropriate, and definitions for each will be improved. In addition, the Department will evaluate and implement improvements to its Prequalification Regulations, 720 CMR s. 5.0 et seq.
4. The Department has scheduled meetings with the Office of the Attorney General to review these and other proposed improvements.

The Bureau believes that these steps, if implemented immediately will cure the defects in the current process. The Bureau remains concerned however that MHD's actions to expedite the bid process may subvert the intent of the prequalification statute. The public construction laws which were designed to provide open, competitive bidding among reputable and qualified

contractors. MHD must establish a process whereby all requests for information and questions by contractors are freely distributed to all of the competitors for a contract.

The Bureau does not believe that simply "rubber stamping" or expediting prequalification applications protects the Commonwealth from unqualified contractors. The prequalification statutes are based on the original Ward Commission recommendations.

'The prequalification system requires the Commonwealth to adopt an effective system for rating the performance of general contractors on public construction projects.'⁷

That same Commission cautioned however that reliance on bonding companies alone may not be sufficient to protect the public from incompetent contractors. (Ward Commission, Vol I, pg. 344) In a project as sophisticated as the CA/T where the potential for huge overruns is very real, care must be taken to insure that the applicants are legitimately qualified. MHD's recent actions to effectuate statutory changes that eliminate the provisions of financial statements from the prequalification process may raise the stakes unnecessarily on this mega public works project. The Bureau also has heightened concerns here in light of the increasing number of joint ventures that have been formed to bid on these CA/T jobs. The lines of authority in the joint ventures can easily be blurred and result in a less than complete view of qualifications of the particular entity that is actually doing a specific component of contract work.

Conclusion

This contract process which culminated in a harsh court decision negating MHD's action was regrettable and preventable. The Bureau's review indicates that MHD appears to have taken all of the steps necessary to correct the problems and prevent it from happening

⁷Ward Commission, Vol I, pg. 351.

again. The Bureau believes however that MHD must be vigilant in openly and consistently communicating to all concerned the appropriate rules of the game for contracting.

Clear, concise and unequivocal bid documents, notices, and directions must be made available to all bidders. When questions arise, questions and answers should be made available to all who have participated in the process. It is incumbent on MHD to insure the integrity of this public process.



MASSACHUSETTS HIGHWAY DEPARTMENT

NOTICE TO CONTRACTORS

Sealed proposals for the following project will be received at the Cashier's Office, Room 5441, 10 Park Plaza, Boston, Massachusetts, 02116 until the date and time stated below and will at that place and time be publicly opened and read:

May 16²³, 1995 at 2:00 PM
 Boston: FAP No.: NH 93-1 (390)
 Central Artery/Tunnel Project
 Utilities Relocation East India Row to State Street (C14C4)

PROPOSAL GUARANTY: 5% of Bid

PROJECT VALUE: \$14,000,000

THE MASSACHUSETTS HIGHWAY DEPARTMENT IS COMMITTED TO SUBSTANTIVE PARTICIPATION OF DISADVANTAGED BUSINESS ENTERPRISES IN THE PERFORMANCE OF THE WORK OF THIS CONTRACT AND HAS THEREFORE ESTABLISHED A DBE UTILIZATION GOAL OF 15% FOR THIS CONTRACT.

Bidders must be prequalified by the Department in the following category UTILITIES to bid on the above project.

The Work shall include, but not be limited to,

The construction of new duct banks and manholes for the following system: electric power (BEC and MBTA), telephone (NYNEX), and communications (CATV, TCR and MCI). Other utility installations include: new manholes and piping for storm drain and sanitary sewer systems (BWSC); new piping for BWSC Low Service (LS) and High Service (HS) water distribution systems; new piping for a high pressure water distribution fire service system (HF) and new piping for intermediate and low pressure gas systems (BGCo).

The bidding for and award of this Contract are to be in accordance with the requirements of Massachusetts General Laws Ch. 30, Section 39M. Bidders are on notice that this project is subject to the schedule of prevailing wage rates as determined by the Commissioner of the Department of Labor & Industries (Commonwealth of Massachusetts) and the United States Department of Labor.

The Proposal Guaranty shall be in the form of cash, bid bond, certified check, treasurer's check or cashier's check made payable to the Massachusetts Highway Department. Payment for Specifications/Proposal Pamphlet, and set of Plans may be made in cash, money order, certified check, treasurer's check or cashier's check and will be \$395 payable at Room 5441 at the above address. The amount will be refundable, for one set only, to official bidders who submit a formal bid for the project and upon return of the documents in good condition to the CA/T Project Office at 185 Kneeland Street, within 15 Days following the opening of bids, or to a common carrier or the post office

MASS

HIGHWAY

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Argeo Paul Cellucci
Lieutenant Governor

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Secretary

Laurinda T. Bedingfield
Commissioner

JUN 23 3 03 PM '95

June 22, 1995

Representative William P. Nagle, Chairman
House Post Audit and Oversight Committee
Room 146
State House
Boston, MA 02133

Dear Chairman Nagle:

I read with interest the article in this morning's Boston Herald in which Speaker Charles F. Flaherty called for an investigation of this Department's actions surrounding its receipt of bids for Contract No. C14C4, a contract for relocation of utilities in Boston. This letter will detail the background in this matter, Department actions taken and remedial measures being instituted in response to the decision issued by Judge Volterra. In addition, MHD welcomes your review and will cooperate fully with it.

BACKGROUND

Contract No. C14C4 provides for extensive relocation of underground utilities, including sewer and drainage lines, water lines, main trunk lines for water and gas, electric lines, telecommunication lines, MBTA electric power lines and steam lines. The work is to be done between East India Row and State Street beneath the Surface Artery. It was estimated to cost \$17.6 million.

In its official Notice to Bidders the Department advertised this as a "Utility" contract. As such all bidders were required to be "prequalified" in the category of utility construction. This, however, was the first time the Department advertised work under this category.

In April, 1994 the Department modified its Prequalification Regulations, 720 CMR s. 5.0 et seq., in part, to eliminate unnecessary duplication. Rather than evaluate a contractor's prequalification status at the time a bid proposal was issued and again at bid opening, the Department sought to do so only once, when bids were opened. This process would save contractors time and expense, and avoid a situation where a contractor's prequalification status could have changed between time of proposal issuance and time of bid, often several months apart.

Representative William P. Nagle
June 22, 1995
Page Two

Notice of this change was published, proper hearings were held and workshops were conducted with the cooperation of the Construction Industries of Massachusetts.

General Laws c. 29 s. 8B states in pertinent part that "the commissioner shall refuse to furnish such prospective bidder with bid proposals" if the bidder is not prequalified to do the work at issue. In part, because the Department had never used this category previously none of the bidders issued proposals were, in fact, prequalified to perform utility work. The Department issued official proposals to prospective bidders without taking appropriate steps to ensure that each was prequalified, in apparent violation of s. 8B. Only Modern Continental, after receipt of an official proposal, inquired of the Department whether it needed to be prequalified, and took steps to become prequalified.

On May 23, 1995 bids were opened. It became immediately apparent that Modern, the fifth bidder, was the only prequalified bidder, and the only responsible bidder. There was no question, and MHD's construction engineer so testified at trial on June 16, that all of the bidders were "qualified" to perform the work. However, MHD was not in position to impliedly waive the requirement in M.G.L. c. 30, s. 39M and 720 CMR s. 5 et seq., that the contract be awarded to a prequalified bidder.

The Department was therefore faced with two options: (1) award to Modern, or (2) reject all bids and readvertise. After a careful evaluation of the relative costs between these two options, MHD chose option (1). The difference between McCourt's apparent low bid of \$12,473,975 and Modern's bid of \$13,724,122 was \$1,230,147. (Modern's bid was still 22 percent below the engineer's estimate.) The costs associated with delays in rebidding the contract was estimated to be approximately \$2 million. MHD believes that the resulting \$800,000 differential between the costs of delay and \$1.2 million split between the bids justified its decision to award to Modern.

In my opinion MHD did not have the authority to waive the statutory and regulatory requirements that the contract be awarded only to a bidder prequalified to perform the work specified, nor could it impliedly accept McCourt's qualification as appropriate prequalification. Only the Superior Court could make such a determination and we applaud the outcome in this case. Indeed, when it became apparent that litigation would be required to resolve this matter the Department urged an expedited review and decision because any delay would work to the detriment of the Project and to the taxpayer. The court's decision was appropriate. The taxpayer clearly won.

Representative William P. Nagle
June 22, 1995
Page Three

This Department has consistently taken the least cost approach, as allowed by law, and has exercised appropriate discretion to waive obvious clerical and other errors by bidders and award contracts to the lowest eligible and responsible bidders. See, for example, Daniel O'Connell's Sons, Inc. v. Commonwealth of Massachusetts, Suffolk County Superior Court No. 95-2122. In that case, the Court affirmed a decision of the Department to waive an apparent clerical error in the low bid and award the contract to it. That decision saved the taxpayer approximately \$2 million for the construction of viaducts on Interstate Route 291 in Springfield. However, in the instant case, we believe that the law tied our hands and we were prohibited from exercising discretion to award to McCourt. Our least cost alternative - without judicial intervention - was to award to Modern.

REMEDIAL MEASURES

The Department has taken the following immediate measures to correct the problem:

1. For those contracts where official proposals have been issued to contractors not prequalified to perform work in a particular category, MHD has issued formal notice, by certified mail, to each such contractor rescinding its issuance of the official proposal, and notifying the contractor that it must become prequalified in order to receive a new official proposal. The notice also indicates that the Department's Prequalification Committee will expedite review of any application for category expansion to accommodate each contractor's opportunity to bid.

2. The Prequalification and Contract Office will hereafter certify a contractor's prequalification status before an official proposal is issued to any contractor. The Prequalification Committee is also prepared to expedite review of any application for category expansion to accommodate the contractor's opportunity to bid.

3. The Department has undertaken a complete review of the categories it maintains, including the definitions for each. Realistic and legitimate categories will be retained, new categories will be created where appropriate, and definitions for each will be improved. In addition, the Department will evaluate and implement improvements to its Prequalification Regulations, 720 CMR s. 5.0 et seq.

4. The Department has scheduled meetings with the Office of the Attorney General to review these and other proposed improvements.

Representative William P. Nagle
June 22, 1995
Page Four

As you know, the Department annually advertises dozens of contracts with an aggregate value in excess of \$1 billion (inclusive of the Central Artery/Tunnel Project). Although the new prequalification procedures have been in place for over one year it never experienced this type of problem and, based on the remedial steps outlined above, does not anticipate any in the future.

When you have had an opportunity to review this material, please don't hesitate to call me at 973-7033 to discuss it. I am available to meet with you and your staff at your convenience.

Sincerely yours

A handwritten signature in dark ink, appearing to read "Ed J. Corcoran II", with a horizontal line extending to the right.

Edward J. Corcoran II
Chief Counsel

cc: Speaker Charles F. Flaherty

MASSACHUSETTS HIGHWAY DEPARTMENT
COMMENTS TO HOUSE POST AUDIT AND OVERSIGHT BUREAU
REVIEW OF CONTRACT NO. C14C4

AUGUST 17, 1995

I. Findings and Recommendations.

This will provide Massachusetts Highway Department (MHD) comments to the House Post Audit and Oversight Bureau's draft report concerning Central Artery/Tunnel Project contract no. C14C4. In substance, MHD agrees with the Bureau's overall findings but disagrees with certain specifics.

1. MHD did not "disqualify" seven of eight contractors as suggested. Rather, because the seven contractors had not been prequalified, they were technically ineligible to bid under the regulations. MHD has reinstated a process to ensure that contractor prequalification is certified prior to issuance of official bid proposals.

2. MHD believes that it did sufficiently publicize the category of work in the Notice to Bidders. MHD failed to properly certify contractor prequalification prior to issuance of official bid proposals. Contractors were therefore justified in asserting Department recognition of their prequalification at trial.

3. MHD agrees that its process did not comply with the provisions of G.L. c. 29, s. 8B.

4. MHD is instituting provisions to remedy problems in coordination with the Office of Attorney General and representatives of the Construction Industries of Massachusetts.

5. MHD is amending its procedures to adhere to the requirements of G.L. c. 29, s. 8B. However, MHD asserts that it must still check a contractor's prequalification at the time of bid. Among the reasons for the second review is the fact that several months often pass between issuance of bid proposals and receipt of bids. In that time a contractor's bonding capacity could be reduced, its financial circumstances changed, and poor performance on other Department contracts could raise questions about the contractor's ability to perform on the instant project.

6. MHD, in conjunction with other agencies and representatives of the construction industry, constantly strives to improve its processes. MHD is extremely vigilant in its efforts to preserve the integrity of the bid process.

II. General Comments to Findings in the Report.

As indicated in a June 22, 1995 letter of its Chief Counsel to Chairman William P. Nagle (identified as Appendix #4), MHD carefully evaluated its options for resolution of the C14C4 contract bid issue. It believes that it exercised the least cost alternative available to it without judicial intervention. Its decision to award the contract to Modern Continental, the only bidder which was technically prequalified at the time of the bid, was less costly to the taxpayer than the rejection of bids and a time consuming process of rebidding the contract.

MHD agrees that revised prequalification regulations adopted in 1994 conflicted with the requirements of G.L. c. 29, s. 8B and that adherence with the regulatory process, as opposed to the statute, resulted in its failure to properly alert contractors that they were, in fact, not prequalified. It is important to note, however, that the revisions were adopted after the industry and its representatives, including officers of the bidders in this case, had the opportunity to review and comment on them. MHD agrees with the Bureau's findings that the changes it proposes will cure the defects in the process.

MHD takes exception, however, to the Bureau's comment on page 12 that "MHD's recent actions to effectuate statutory changes that eliminate the provisions of financial statements from the prequalification process may raise the stakes unnecessarily on this mega public works project." It is the legislature, not an agency of the executive branch, which effectuates statutory changes. The legislature apparently recognized the fact, that in the case of contractor default in the performance of a contract, MHD's greatest protection lies with the surety company. The combination of all factors which must be considered in the prequalification process ensures that contracts are awarded only to contractors with the capacity and experience to prosecute the work.

MHD takes its obligation to ensure the integrity of the bid process very seriously. All information pertinent to a particular bid is shared with all bidders. The Department answers questions asked by one bidder by publishing the question and the answer with all potential bidders. All modifications to bid documents are shared by publicly advertised addenda, copies of which are mailed to bidders.

